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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MARY C. MUSAELIAN, Plaintiff and Appellant, v. WILLIAM L. ADAMS et al. Defendants and Respondents.	A130941 (Sonoma County Super. Ct. No. SCV236208)

Plaintiff Mary Musaelian appeals an order awarding attorney fees to defendant Williams Adams based on an attorney fee clause in an arbitration agreement. She contends the trial court improperly awarded fees for the time Adams's attorney spent representing himself; that Adams is not a prevailing party; that the amount of the award was excessive; and that her husband, Andrew Musaelian,[1] was improperly held jointly and severally liable for the fees. We shall affirm the order.

I. BACKGROUND

We have had four previous occasions to write opinions in this action (*Musaelian v. Adams* (July 25, 2007, A112906) [nonpub. opn.] (*Musaelian I*)[2]; *Musaelian v. Adams* (May 18, 2010, A116412) [nonpub. opn.] (*Musaelian III*); *Musaelian v. Adams* (Jan. 3, 2011, A129965) [nonpub. opn.] (*Musaelian IV*); and *Musaelian v. Adams* (2011) 197

[1] Because Mary and Andrew Musaelian share the same last name, we will refer to them by their first names. We intend no disrespect by this designation.

[2] Our Supreme Court granted review of *Musaelian I*, and affirmed our judgment in *Musaelian v. Adams* (2009) 45 Cal.4th 512 (*Musaelian II*).

Cal.App.4th 1251 [partially pub. opn.] (*Musaelian V*)), as well as deciding an appeal in the underlying action (*Reiter v. Musaelian* (June 30, 2006, A110100) [nonpub. opn.] (*Reiter*)), and considering innumerable requests for sanctions and other motions throughout this litigation. The background of this case is discussed in our previous opinions, and we will repeat it here only as necessary to understand the issues properly before us in this appeal of the attorney fee order.

Adams acted as Reiter's counsel in the underlying tort action brought by Reiter against Andrew. Mary later brought this action against Reiter and Adams, alleging causes of action for negligence, intentional infliction of emotional distress, abuse of process, slander of title, invasion of privacy, and malicious prosecution. Proceedings in connection with the bankruptcy of Mary and Andrew took place in the United States Bankruptcy Court for the Northern District of California, including an adversary proceeding between the Musaelians as plaintiffs, and Reiter and Mark Clausen (counsel for Reiter and Adams) as defendants.

In February 2006, a settlement agreement was signed. Under the agreement, as pertinent here, Mary and Andrew agreed to dismiss with prejudice all state court appeals (but not those of their attorney, John Warner) and their adversary proceeding in the bankruptcy court; Adams, Reiter, and Clausen entered into a mutual release with Mary and Andrew and their counsel of all claims except those of Reiter and Adams for sanctions and attorney fees (with the proviso that Reiter and Adams could look only to existing appellate bonds to satisfy their claims)[3]; Reiter and Adams agreed to pay Mary and Andrew the first $22,500 recovered on the appellate bonds; the parties agreed to binding arbitration in the event of any dispute under the terms of the settlement agreement; and the prevailing party in any dispute under the settlement would be entitled to reasonable attorney fees. The signatories were Clausen, Reiter, Peter Califano (an attorney for the Musaelians in the bankruptcy proceedings), Mary, Andrew, and Adams.

[3] In *Musaelian III*, in which Warner was the appellant, we reversed an order granting Adams's motion to appropriate a cash deposit in lieu of an appeal bond. (*Musaelian III, supra*, slip op. 1, 7.)

In 2008, after a dispute arose with respect to the settlement agreement, Andrew and Mary filed demands for arbitration with the American Arbitration Association. According to the demands, the dispute concerned the provision of the settlement agreement that entitled Mary to the first $22,500 recovered from the cash deposit in lieu of appellate bond. (This was the same deposit at issue in *Musaelian III, supra,* slip op. 3.) Upon a motion by Adams and Reiter, the trial court stayed the arbitration in August 2008. In 2009, Mary brought a petition to compel arbitration of the dispute. The trial court denied the motion on July 7, 2010, concluding (1) as a result of this court's decision in *Musaelian III*, there was no money available to pay the Musaelians, and (2) the Musaelians had waived their right to seek arbitration by engaging in litigation of the underlying issues after entering into the settlement agreement.[4]

Adams moved for attorney fees and costs as the prevailing party in the arbitration-related proceedings, seeking fees from both Mary and Andrew. On November 29, 2010, the trial court granted the motion, concluding Adams was entitled to attorney fees and costs in the amount of $40,074 as the prevailing party. Although Andrew was not a named party to the litigation, the trial court concluded he had submitted himself to the court's jurisdiction by appearing in the litigation, filing affidavits, and requesting orders from the court, and held him jointly and severally liable with Mary for the attorney fees and costs.

This appeal from the attorney fee order ensued.

II. DISCUSSION

A. Award of Fees for Clausen's Work

Mary contends that Clausen, Adams's attorney, was a party to the litigation and therefore the trial court should not have awarded fees for the work he performed in connection with the arbitration-related proceedings. "[A]n attorney who chooses to litigate in propria persona and therefore does not pay or become liable to pay

[4] In *Musaelian IV*, we dismissed Mary's appeal of that order as untimely. Accordingly, we do not consider any challenges to the propriety of that final order. (*Musaelian IV, supra*, slip op. 3.)

consideration in exchange for legal representation" cannot recover contractual attorney fees under Civil Code section 1717 for the time and effort he spends on his own behalf. (*Trope v. Katz* (1995) 11 Cal.4th 274, 292 (*Trope*).) Mary takes the position that this principle is applicable here.

In support of her contention that Clausen was a party to the arbitration-related proceedings, Mary points to pleadings from the adversary proceeding in the bankruptcy court indicating that Clausen was a party to that proceeding.[5] She also contends he was a party to the settlement agreement that contained the arbitration provision and therefore was a proper party to the arbitration-related proceedings.

We conclude the trial court did not err in awarding attorney fees for Clausen's work on Adams's behalf. In its order awarding attorney fees, the court characterized as "frivolous" the Musaelians' attempt to force Clausen into arbitration as a party.[6] The record supports the court's finding that Clausen was not properly a party to the arbitration demand. As Mary correctly notes, the agreement recites that Clausen entered into a mutual release with the Musaelians and their attorneys, and his signature on the settlement agreement did not state that he signed solely as counsel for Adams. But the agreement imposed no other obligations on Clausen; any financial obligations contemplated by the agreement all fell to Reiter, Adams, and the Musaelians. Indeed, in their demands for arbitration, the Musaelians characterized the nature of the dispute as follows: "Respondent entered into a written agreement to pay claimants $22,500.00 plus

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[5] The record does not indicate that the bankruptcy court pleadings on which Mary relies were before the trial court, and by order filed this date, we have granted Adams's motion to strike those papers from the record on appeal. However, pleadings submitted in Adams's supplemental appendix indicate Clausen was named as a defendant in the adversary proceeding in the bankruptcy court.

[6] In a 2008 order staying arbitration, the court had been more expansive, stating that Clausen's signature on the settlement agreement "does not appear to be one creating on the part of Clausen any right or duty susceptible of arbitration," that Clausen appeared to have signed as attorney for Adams and Reiter, and that "the language of the document does not contain any expression of Clausen's agreement to pay any money to anyone . . . ."

applicable interest due to several violations of the Bankruptcy Discharge Injunction [citation] issued by the Court in December, 2004. Respondent was a signatory to the document and have refused to pay the agreed upon damages. [*Sic*.] Claimants performed their respective obligations per agreement." Although Clausen is named as respondent in this demand, the plain language of the settlement agreement shows that "Reiter and Adams"—not Clausen—"agree to pay [the Musaelians] the first $22,500 recovered on account of the appellate bonds. Thereafter all recoveries on the bonds are the assets of Reiter and Adams."

Moreover, Clausen represented Adams—who no one disputes would have been a proper party to an arbitration proceeding—during the relevant time period, and there is no basis to conclude the arbitration-related work he performed was not done on his client's behalf. (See *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 525 [where attorney-client relationship exists, *Trope* does not preclude award of attorney fees for attorney who was codefendant with clients to whom she rendered legal services].) Clausen stated in his declaration in support of Adams's motion for attorney fees that with the exception of a motion to compel his dismissal from the arbitration, virtually all of the time he claimed would have been spent on Adams's behalf whether or not the Musaelians' had named him as a party to the arbitration. He also stated that he claimed $20,000 less in fees than he billed on the arbitration-related proceedings, an amount he averred would "more than account[] for any time spent by [Clausen] which the Musaelians may claim was for [his] own personal benefit, rather than Adams'." This declaration stands unrebutted. On the record before us, Mary has not shown the trial court erred in awarding fees for Clausen's services.[7]

[7] Based on the same facts, we also reject Mary's contention that Clausen acted improperly by failing to inform the court he was a party to the settlement agreement.

B. Prevailing Party

Mary argues that because no arbitration took place, there was no prevailing party, and therefore Adams was not entitled to attorney fees as the prevailing party.[8] She characterizes her position as dictated by "simple logic." This contention has no merit. A court may properly award fees for time spent successfully opposing a petition to compel arbitration. (See *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 786-787; *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 799, 807.)[9]

C. Amount of Fee Award

Mary contends Clausen did not reasonably spend all of the claimed time in connection with the arbitration demands, but rather, much of his time was spent in litigating matters against Warner. We will interfere with the trial court's determination of reasonable attorney fees " 'only where there has been a manifest abuse of discretion.' " (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) It is, of course, the appellant's burden to show such an abuse of discretion. (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1249-1250.) Mary has not met that burden. The billing records indicate not only that Adams sought recovery for time Clausen spent in connection with the proposed arbitration, but that he deducted

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[8] The settlement agreement provides, "In the event of any dispute under this settlement, . . . the prevailing party in such dispute shall be entitled to reasonable attorney fees."

[9] In connection with this argument, Mary asserts that she did not receive proper notice of Adams's and Reiter's 2008 motion to stay arbitration. Even if the 2008 order staying arbitration were properly before us in this appeal from the attorney fee order (see *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 967 [notice of appeal must identify particular judgment or order being appealed]), the issue is moot in light of the court's later order denying Mary's petition to compel arbitration. Indeed, in a pleading filed in this appeal on October 26, 2011, entitled "ALL PENDING OPPOSITIONS/MOTIONS/OSC . . . ," Mary states that "the only issues pending" are the July 2010 order denying arbitration and the order awarding attorney fees. As we have noted, Mary's appeal from the order denying her petition to compel arbitration was dismissed and is not before this court in this appeal.

approximately $20,000 from the total cost of his services. Mary provides no analysis of any additional amounts she claims should have been deducted.

Mary also argues the trial court should not have awarded Adams $274 for his costs in connection with the motion for attorney fees. Adams had claimed $40 as a filing fee and $234 for the cost of copying exhibits. In support of his motion for attorney fees, Adams submitted approximately 440 pages of exhibits. In a supporting declaration, Clausen stated that he was required to prepare an original for the court and four duplicate sets of the exhibits.

Code of Civil Procedure section 1033.5, subdivision (a)(13) allows as an item of costs photocopies of exhibits, if they were reasonably helpful to the trier of fact. If the statute allows the particular item, and if it appears proper on its face, the burden is on the objecting party to show the costs to be unnecessary or unreasonable. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 855.) Mary has not met that burden here. She has made no showing either that the exhibits were unnecessary or that the copying cost was unreasonable. Accordingly, we reject her contention.

D. Fee Award Against Andrew Musaelian

Mary argues the trial court should not have held Andrew jointly and severally liable for the attorney fee award. According to Mary, Andrew was not a party to the action and had never appeared in the action so as to submit himself to the court's jurisdiction. For his part, Adams has moved to dismiss the appeal as to Andrew, contending Mary has no standing to raise arguments on her husband's behalf. As Adams points out, Andrew did not appeal the attorney fee order; rather, the notice of appeal and appellants' briefs are in Mary's name only.

It is well settled that "appeals may be taken only by *aggrieved parties*. [Citation.] Appellants must be parties of record, and their rights or interests must be injuriously affected by the judgment. [Citation.]" (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1128.) Moreover, appellants "*may not assert error that injuriously affected only nonappealing coparties*. [Citations.]" (*Ibid.*, italics added.) Andrew is not

a party of record, and Mary has not shown how her interests were harmed by the order finding him jointly and severally liable for the attorney fees.[10]

An exception to the rule that an appellant may not assert error that affected a nonappealing party rule exists where the interest of the nonappealing party is interwoven with those of the appellant. (*Estate of McDill* (1975) 14 Cal.3d 831, 840; *In re Caitlin B.* (2000) 78 Cal.App.4th 1190, 1193.) Here, we have concluded the trial court did not err in finding Adams entitled to the attorney fee award, and hence Mary was properly held liable for the fees. In light of this result, we need not decide whether in another circumstance—for instance, if we had found the fees were not properly awarded against her—Mary could have protected the interests of her non-appellant husband to the extent their interests were intertwined because the judgment against her husband might be satisfied from their community property.

Accordingly, in the circumstances of this case, we will not consider Mary's challenge to the trial court's ruling that Andrew was jointly and severally liable for the attorney fees.[11]

III. DISPOSITION

The order appealed from is affirmed.

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[10] As noted in *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736, "one who is legally 'aggrieved' by a judgment may become a party of record and obtain a right to appeal by moving to vacate the judgment pursuant to Code of Civil Procedure section 663." (See also *People ex rel. Reisig v. Broderick Boys* (2007) 149 Cal.App.4th 1506, 1516 ["there is a well-settled procedure by which an aggrieved person may move to set aside a judgment and then appeal if the motion is denied, *thereby achieving party status*"]; *Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 15-16.) Andrew did not avail himself of this procedure.

[11] Because Andrew is not an appellant, we have no basis to grant Adams's motion to dismiss the appeal as to him, filed September 1, 2011, and accordingly deny it. We deny as moot Adams's motion, filed March 2, 2011, for an order finding that Andrew is not a party to the appeal or, in the alternative, dismissing the appeal as to him.

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RIVERA, J.

We concur:

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REARDON, ACTING P. J.

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SEPULVEDA, J. *

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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